



REPUBLIC OF KENYA



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**Kinyua v M'Imwera (Civil Appeal 251 of 2019)
[2025] KECA 405 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KECA 405 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 251 OF 2019
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
FEBRUARY 28, 2025**

BETWEEN

ERIC MUTWIRI KINYUA APPELLANT

AND

KIRAI M'IMWERA RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Meru (Cherono, J.) delivered on 3rd June, 2019 in E.L.C Case No.18 of 2015. (OS))

JUDGMENT

1. This appeal arises from the judgment delivered on 3rd June, 2019 in Meru Environment and Land Court (ELC) Originating Summons (OS) No. 18 of 2015 where the Court dismissed the appellant's claim for adverse possession of LR No. Abothuguchi/Githongo/1147. The appellant contends that the ELC erred in dismissing his claim.
2. This is a first appeal and our mandate in such a matter was well stated in the case of Nairobi Bottlers Limited vs. Imbuga (Civil Appeal E661 of 2022) [2024] KECA 434 (KLR) as follows:

“Our mandate in a first appeal as donated by rule 31 of the Court of Appeal Rules, 2022 is to re-appraise the evidence and to draw inferences of fact; to retry the case. That mandate has been the subject of various judicial pronouncements in such cases as Nicholas Njeru vs. Attorney General & 8 Others [2013] eKLR where it was stated: “[In] a first appeal, we are required to re-evaluate the evidence and arrive at our own independent findings and conclusions of the matter.”
3. What was the case made out by the parties before the ELC?
4. The appellant, Eric Mutwiri Kinyua, was the plaintiff where he had sued the respondent, Kirai M'Imwera, seeking a declaration that he, the appellant, had become entitled to 1.5 acres of LR No.



- Abothuguchi/Githongo/1147 (“the suit property”) by virtue of adverse possession. He asked the Court to order that the property be subdivided and the said portion be registered in his favour.
5. It was the appellant’s case that he had been in possession of the suit property since August, 2002 after his late father entered into a sale agreement dated 11th May, 1999 with the respondent, where the appellant’s father purchased 1.5 acres of the suit property. The appellant stated that he got married in 2002 and moved his family onto the suit property and had made developments on the property since then. In 2008, the appellant received a letter to vacate the suit property and the said letter indicated that he entered the suit property on the basis of a void agreement. The appellant told the court that there had been a suit filed by the respondent against his father, but the suit had abated in 2008 after his father died.
 6. The respondent admitted that he entered into an agreement with the appellant’s father, where he was to sell 1.5 acres of the property to the appellant’s father, but the transfer was not concluded, because the property size on the ground turned out to be smaller by 1 acre, than the property size indicated in the green card. He told the appellant’s father (now deceased) that he would refund the purchase price. He filed a suit Meru HCCC 33 of 2007 seeking to evict the appellant’s father. The respondent also filed another suit CMCC 29 of 2015 seeking to evict the appellant and his mother from the land. In the OS at the ELC, the respondent filed a counterclaim seeking an order of eviction against the appellant and removal of a caution placed on the property, as well as mesne profits.
 7. The ELC considered the matter and delivered judgment on 3rd June, 2019, where it found in favour of the respondent herein. It held that the appellant’s possession was given to him by his late father therefore it was not adverse. The court additionally faulted the appellant’s amendment of his occupation of the property from 2007 to 2002 as an attempt to meet the time factor required by statute for a claim of adverse possession. The appellant’s OS was dismissed and the respondent’s counterclaim was allowed. The appellant was directed to vacate the property within 6 months or be evicted therefrom.
 8. The appellant has filed a notice of appeal dated 4th June, 2019, a memorandum of appeal dated 4th September, 2019 and submissions dated 6th May 2024 in support of the appeal. The appellant asks this Court to set aside the judgment by the ELC and allow the claim in the OS.
 9. The appellant prefers five grounds of appeal; namely, that his claim for adverse possession was independent of his father’s sale agreement; that his entry into the suit property in 2002 was uncontroverted; that the appellant did not fulfill the sale agreement; that the appellant could not have made a claim for enforcement of the agreement and that the court erred in ordering his eviction from the property his family has stayed in peacefully since 1999.
 10. In his submissions, the appellant submits that the sale agreement between his late father and the respondent was voided by section 7 of the *Land Control Act*. Regarding the amendment of his suit, the appellant submits that he entered the suit property in 2002 after his marriage, which fact was corroborated by the witnesses. In his view, the court erred in finding that his amendment of the OS was in bad faith. The appellant urges that he proved his claim on a balance of probabilities and asks the court to allow his appeal.
 11. The respondent filed submissions dated 10th June, 2024 opposing the appeal. The respondent submits that the appeal lacks merit and is not arguable. The respondent states that the entry of the appellant on to the suit property was lawful and as a result of a sale agreement between the respondent and the appellant’s father.



12. The respondent also submits that time stopped running when he filed Meru HCCC No. 32 of 2007 and the statutory 12 years had not been met in order to support the claim for adverse possession.
13. This appeal came up for hearing before us on 28th October, 2024 where the appellant was represented by learned counsel Mr. Mburugu and the respondent by learned counsel Mr. Mikra. Both parties adopted their written submissions as filed.
14. We have considered the record of appeal and the submissions by the parties and the law.
15. A claim for adverse possession is brought on the strength of section 38 of the *Limitation of Actions Act*. Section 38(1) provides;
 - “ 38. Registration of title to land or easement acquired under Act.
 - (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”
16. For a party to succeed in a suit for adverse possession, the following circumstances must arise as considered by this Court in the case of *Mtana Lewa vs. Kahindi Ngala Mwangandi* [2015] eKLR:
 - “ Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
17. The question is whether the appellant met the above threshold. It is not disputed that the suit property in issue is registered in the name of the respondent. It is also not in dispute that the appellant’s possession of the suit property came about as a result of the initial act of the botched sale of the land to his late father. The sale itself happened in 1999 as evidenced by the sale agreement dated 11th May, 1999. In the original OS, the appellant stated that he was a minor at the time but he moved into the land in August, 2007 as an adult. The respondent in his counterclaim, also stated that the appellant entered the property in 2007. In his reply to the respondent’s defence, the appellant began to claim to have entered the suit property in August, 2002 and not August 2007, and that his father vacated the land for him in August, 2002. He amended the OS in 2017, and in the supporting affidavit, changed the date of his entry into the property to 2002. The trial court found that the amendment was made in bad faith to mislead the court.
18. While giving his testimony, the record reflects that the appellant told the court that he was claiming the land on the strength of the sale agreement between his late father and the respondent. He added that when he entered into the land, the respondent welcomed him. Therefore, it is undisputed that his entry into the land was with the permission of the title holder, the respondent.
19. It is clear to us that even if the appellant entered the suit property in 2002 as claimed, the suit Meru HCCC No. 32 of 2007 stopped the running of time, notwithstanding whether it was the appellant or



his late father in possession of the suit property. This is what this court stated on that issue in Njuguna Ndatho vs. Maasai Itumo & 2 Others [2002] eKLR:

“The position in Kenya as regards when the time would stop running against an adverse possessor has been amply set out. In the case of William Gatuhi Murathe vs. Gakuru Gathimbi (Civil Appeal No. 49 of 1996) (unreported) this Court followed the decision in the case of *Joseph Gabumi Kiritu vs Lawrence Munyambu Kabura (Civil Appeal No. 20 of 1993)* (unreported) which reviewed previous judgments of this Court on the issue of time and it was held that the filing of a suit for recovery of land would stop time from running for the purposes of Section 38 of the *Limitation of Actions Act* under which a person may claim to have become entitled to land by adverse possession. We would set out the following excerpt from the judgment of Kwach JA in Kiritu vs Kabura (supra):

“The passage from Cheshire’s Modern Law of Real property to which Potter JA. made reference in Githua vs. Ndeete is important and deserves to be read in full. It is at page 894 Section VI under the rubric the methods by which time may be prevented from running and the learned author says-

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the Real Property Limitation Act 1833, in a section which has been repeated in the Limitation Act 1939, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land.”

20. That suit Meru HCCC No.32 of 2007 abated in 2008 and we deduce that time began running again in 2008, until 2015 when two suits were filed, Githongo CMCC 29 of 2015 and Meru ELC OS No. 18 of 2015. It is certain that neither of the two periods of time, namely from 2002 to 2007, and 2008 to 2015, met the 12 years’ time frame required by statute, to enable the appellant lay a claim to the property by way of adverse possession.
21. The appellant in any event, could not legally proceed on the claim based on an agreement for sale and turn around to claim adverse possession. The agreement for sale was governed by processes under the *Land Control Act*. There was no evidence placed before the court that consent of the Land Control Board to subdivide and transfer the land, was ever sought or obtained. That agreement for sale became voidable in the circumstances. It was the respondent’s case before the Judge, that there was a change of mind and that he agreed to refund the purchase price to the appellant’s father or to the appellant after his father’s demise. The Judge reached the correct decision in the case made before him. There is no merit in this appeal which we dismiss with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF FEBRUARY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI – ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

